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In the Supreme Court of the United States

OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that when the contracting officer terminated the contract pursuant to a termination for convenience clause, and did not act in bad faith or abuse his discretion, the contractor is limited to recovering termination for convenience damages and not anticipatory profits.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1537. The decisions of the United States Court of Federal Claims (Pet. App. 1b-46b, 1c-35c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A petition for rehearing was denied on November 7, 1996. Pet. App. 1d. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 30, 1985, the United States Army Corps of Engineers awarded a contract to petitioner for the demolition of an abandoned U.S. Air Force airfield and missile site near Raco, Michigan. Based upon blueprints and its surveys, the Corps estimated that two buildings at the site contained asbestos contamination in 1,600 linear feet of pipe insulation and 650 square feet of tank and duct insulation. The surveys also revealed that extensive vandalism may have spread debris containing asbestos on the floors of the buildings. Pet. App. 2a. The Corps estimated that bids should range between $500,000 and $1,000,000. Based on the Corps' estimated quantities, petitioner was awarded the contract with its bid of $414,696, which was the low bid among seven other bidders. *Id.* at 2a, 5b. The Corps estimated that the asbestos removal would cost about $40,000, which was approximately 10% of the total cost of the contract. *Id.* at 15a.

Ten days after petitioner acknowledged receipt of the Corps' notice to proceed with the contract, petitioner notified the Corps that its predemolition survey revealed asbestos in the vinyl flooring and roof insulation of the Raco buildings. Petitioner proposed removing the tile for a unit price of $8.78 per square foot, which was the unit cost of removing additional duct insulation under the contract. Pet. App. 3a. Further tests revealed the presence of asbestos contamination in the floor tile and flashing in one building, but not in the roof insulation. *Id.* at 3a-4a. Based on its examination of drawings of the site, the Corps estimated that 36,340 square feet required asbestos removal, which, at $8.78 per square foot,

resulted in increased costs of about $320,000. *Id.* at 4a.

On September 5, 1986, the contracting officer terminated the contract for the convenience of the government under a provision of the contract that provides that

> [t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

Pet. App. 4a, 15a. The contracting officer followed the Corps' general policy of terminating the contract for the convenience of the government and reprocuring the contract competitively when a price increase would exceed 33% of the total contract price. The contracting officer also considered the fact that petitioner had not started work on the contract, but only had transported four pieces of equipment to the Raco site. *Id.* at 4a. Following the termination, the Corps solicited new bids based upon the additional asbestos work. Petitioner, the sixth-lowest bidder out of eight, bid $1,200,000 to perform the work. The contract was awarded to the lowest bidder for a price of $443,200, and the government ultimately paid $542,861.60 to the new contractor for the work. *Ibid.*

2. On April 19, 1989, petitioner filed suit in the United States Claims Court[1] seeking a determination that the Corps had breached its contract. On March

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[1] On October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902(b), 106 Stat. 4516 (codified at 28 U.S.C. 171 note).

2, 1993, the court issued its opinion holding that the Corps breached its contract by improperly terminating the contract for the convenience of the government. Pet. App. 1b-46b. Relying on *Torncello* v. *United States*, 681 F.2d 756 (1982), in which a plurality opinion of the en banc United States Court of Claims stated that the termination for convenience clause applies only when there is some change from the parties' original bargain, the Claims Court held that the government "shows no requisite change of circumstances on which to justify a termination for convenience." Pet. App. 33b-34b. The court alternatively concluded that even were it to reject "the *Torncello* rule" in this case and apply the rule of *Kalvar Corp.* v. *United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977), which held that the government may invoke the termination of convenience clause in the absence of proof of bad faith or abuse of discretion, the contracting officer's termination of the contract in this case "constituted an abuse of discretion." Pet. App. 46b; see also *id.* at 37b. On May 19, 1995, the court awarded petitioner damages in the amount of $1,456,851, which included anticipatory profits. *Id.* at 5a, 34c-35c.

3. The court of appeals reversed. Pet. App. 1a-17a. The court began by observing that although "[a]n examination of termination for convenience law from several decades ago discloses mixed signals about limiting terminations under the bad faith/abuse of discretion standard in *Kalvar*, or the change of circumstances test in *Torncello*," "[a] full review of more recent case law, coupled with recent enactments * * * discloses a clear signal for implementation of termination for convenience clauses." *Id.* at 5a-6a (citations omitted). The court described the develop-

ment of the termination for convenience clause, and explained that the clause historically had been limited only by the presence of "bad faith or an abuse of contracting discretion." *Id.* at 7a.

The court also described the 1982 *Torncello* decision by a plurality of judges of the court's predecessor, the Court of Claims. Pet. App. 8a-10a. In *Torncello*, the Navy, "knowing it could acquire the same services at a lower price from another contractor," entered into an exclusive requirements contract and "then began satisfying its requirements from th[e] cheaper source." *Id.* at 8a. Instead of simply applying past precedent and holding that the Navy acted in bad faith, the plurality "proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination" that required "some change in circumstances between the time of award of the contract and the time of termination." *Id.* at 10a.

The court of appeals then explained that the Competition in Contracting Act (CICA), Pub. L. No. 98-369, Title VII, 98 Stat. 1195, enacted in 1984, "fully address[es] the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award." Pet. App. 11a. The court observed that CICA may compel termination and reprocurement if "a contracting officer discovers that the bid specifications inadequately describe the contract work." *Ibid.* (citing 10 U.S.C. 2305 and 48 C.F.R. 1.602-2). The court further explained that "[i]n the wake of CICA," the Federal Circuit has twice "rejected the reasoning of the *Torncello* plurality" and limited the decision in *Torncello* as "stand[ing] for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot

avoid a breach by adverting to the convenience termination clause." Pet. App. 12a-13a, 14a (citing *Salsbury Indus.* v. *United States*, 905 F.2d 1518, 1521 (1990), cert. denied, 498 U.S. 1024 (1991), and *Caldwell & Santmyer, Inc.* v. *Glickman*, 55 F.3d 1578, 1582 (1995)).

Turning its attention to the present case, the court noted that the termination for convenience clause, which "governs the legal relations of the parties," grants the contracting officer the discretion "to terminate the contract with [petitioner] because removing the asbestos-containing vinyl tile would constitute a cardinal change from the originally competed contract." Pet. App. 15a. The court further observed that after the costs of asbestos removal work increased from "$40,000 out of an estimated $415,000 demolition contract" to "$360,000 on a contract near $775,000," the asbestos removal work "originally about 10%, became about 50% of the contract work." *Id.* at 15a-16a. Given that "change in the scope of contract work," the court explained, "different bidders, like asbestos-removal firms, may have entered the competition on the contract." *Id.* at 16a. In these circumstances, the court concluded, "the contracting officer had ample justification for conducting a reprocurement competitively under CICA." *Ibid.*

Finally, the court held that "because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises," the "trial court erred by invoking and relying upon the *Torncello* test." Pet. App. 16a-17a. Based on the absence from the record of any evidence "that the Corps intended from the outset to void its promises," the court held that "*Torncello* does not apply," and

that the contracting officer otherwise "did not abuse his discretion, act arbitrarily or capriciously or in bad faith in terminating the contract for the Government's convenience." *Id.* at 17a. Accordingly, the court reversed and remanded the case for a calculation of "termination for convenience damages which are to include costs of performance prior to termination, profits on that performance and termination costs," but are not to include "anticipatory profits." *Ibid.*

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues that the decision below "calls into doubt the enforceability of government contracts," because "the possibility exists that either party may 'walk away' from a contract at any time during performance." Pet. 13. According to petitioner, because the court of appeals' decision "permit[s] the government to cancel a contract at any point," the contract is "void and unenforceable" for lack of consideration. Pet. 22-23. Those contentions are without merit.

a. The termination for convenience clause permits the government to "terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." 48 C.F.R. 52.249-2(a); Pet. App. 4e. That provision does not render the contract unenforceable. The government's ability to terminate the contact for the convenience of the government is not without limits. As

the court of appeals observed, "[w]hen tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach." Pet. App. 7a. Moreover, the government may not invoke the termination for convenience clause with impunity. In the event of a termination, the contractor may be awarded damages that may include: a "reasonable allowance for profit on work done" (48 C.F.R. 52.249-2(f); Pet. App. 7e); "[t]he contract price for completed supplies or services accepted by the Government" (48 C.F.R. 52.249-2(g)(1); Pet. App. 8e); "[t]he costs incurred in the performance of the work terminated, including initial costs and preparatory expenses allocable thereto" (48 C.F.R. 52.249-2(g)(2); Pet. App. 8e); and "[t]he reasonable costs of settlement of the work terminated" (48 C.F.R. 52.249-2(g)(3); Pet. App. 8e). Indeed, the court of appeals remanded the case for the calculation of "termination for convenience damages," including the costs of performance, profit on that performance, and termination costs. Pet. App. 17a.[2]

Petitioner similarly argues that the decision below conflicts with the principle "requiring the government to fulfill the terms of contracts into which it enters or face liability under the general law of

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[2] In support of its argument that the contract it entered into lacked consideration, petitioner solely relies (Pet. 22-23) on decisions involving indefinite quantities contracts, which were held to be lacking in consideration because they contained no required minimum quantities. See *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489, 493 (1923); *William C. Atwater & Co.* v. *United States*, 262 U.S. 495, 498 (1923); *United States* v. *White Oak Coal Co.*, 5 F.2d 439, 441 (4th Cir. 1925); *Ralph Constr., Inc.* v. *United States*, 4 Cl. Ct. 727, 733 (1984). Those decisions have no bearing on the present case.

contracts." Pet. 23. That argument, however, ignores the fact that terms of the contract to which petitioner objects are part of the bargain petitioner struck with the government. Petitioner offers no reason why it should not be bound by the contract's terms. Cf. *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2471 (1996) ("It is, after all, not uncommon for a contracting party to assume the risk of an event he cannot control.").[3]

2. a. Petitioner also mistakenly argues (Pet. 17-21) that Federal Circuit decisions addressing the question presented are "confusing" and "inconsistent." Petitioner contends (Pet. 19-20) that the court of appeals' decision in *Maxima Corp.* v. *United States*, 847 F.2d 1549 (Fed. Cir. 1988) follows the "changed circumstances" rule of *Torncello*, while the more recent decisions in *Salsbury, Caldwell & Santmyer*, *supra*, and the present case limit the *Torncello* decision to circumstances in which the government enters into a contract with the intent not to perform. The court of appeals correctly determined, however, that its recent decisions "disclose[] a clear signal for implementation of termination for convenience clauses." Pet. App. 5a-6a.

The decision in *Maxima* is not to the contrary. In that case, the government attempted retroactively to invoke the termination for convenience clause after completion of the term of a contract in which the

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[3] The fact that petitioner submitted a new bid for the work even after the government purportedly "walked away" (Pet. 13) from the first contract suggests that petitioner was not unwilling once again to enter into a contract that included a convenience termination clause.

government failed to order the minimum quantity of services required under the contract. 847 F.2d at 1551. The government conceded that the "changed expectations" test applied in that case, but it argued that the government's failure to order the required minimum services constituted the requisite change. *Id.* at 1555. The court held, however, that the constructive termination "a year after completion of performance of the contract by both parties is not a cancellation based on changed expectations. It is, at best, a claim for retroactive adjustment in the contract price." *Ibid.* Thus, as the court of appeals below observed, "*Maxima* stands for the proposition the Government cannot retroactively create a breach in order to change the Government's obligations under a completed contract." Pet. App. 10a n.2.[4]

b. Although not addressed by petitioner, the court of appeals also correctly held that CICA has "render[ed] the plurality's dicta in *Torncello* inapplicable to the present regime of contract administration." Pet. App. 10a-11a. CICA requires that when procuring property or services, the government "shall obtain full and open competition through the use of competitive procedures," 41 U.S.C. 253(a)(1)(A) (1994). As the court of appeals stated, "to accommodate

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[4] Petitioner also argues (Pet. 20-21) that "confusion exists in the decisions of the Court of Federal Claims" on whether the *Torncello* "changed circumstances" rule or the bad faith test governs convenience terminations. Petitioner, however, fails to cite any decisions indicating that trial courts continue to misapply or question the scope of the *Torncello* rule after the 1990 decision in *Salsbury* and the 1995 decision in *Caldwell & Santmyer*. In any event, the uniformity of recent Federal Circuit decisions and the lack of a circuit conflict on the issue belie any need for review by this Court.

CICA's fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition." Pet. App. 11a. Thus, the court of appeals correctly concluded that "CICA permits a lenient convenience termination standard." *Ibid.*

c. In any event, this case would not be an appropriate vehicle to review whether the "changed circumstances" standard of *Torncello* applies to all convenience terminations. The court below held that "[t]he trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience," and the court further noted that "arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard." Pet. App. 16a. Thus, petitioner has not demonstrated that the outcome of this case would likely be different had the court of appeals applied the *Torncello* standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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